15795

No. ~~15795~~

United States Court of Appeals

FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Petitioner,

vs.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and EDWARD T. HYDE,

Respondents.

RESPONSE AND ANSWER OF RESPONDENT, EDWARD T. HYDE, TO RELATOR'S PETITION FOR A WRIT OF MANDAMUS OR WRIT OF PROHIBITION

AND BRIEF IN SUPPORT THEREOF

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United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15975

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Petitioner,

vs.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and EDWARD T. HYDE,

Respondents.

RESPONSE AND ANSWER OF RESPONDENT, EDWARD T. HYDE, TO RELATOR'S PETITION FOR A WRIT OF MANDAMUS OR WRIT OF PROHIBITION

Pursuant to the Court's order of April 11, 1958, the respondent, Edward T. Hyde, in his own behalf, makes response and answer why this Court should not issue a Writ of Mandamus as prayed for and why the Writ of Prohibition should not be granted as prayed for as follows:

1. This Court lacks jurisidiction to compel the United States Court for the Northern District of California, Southern Division (herein referred to as the California Federal Court), to vacate its order denying the transfer of the case of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, as prayed for in the petition.

2. This Court lacks jurisdiction to issue a Writ of Mandamus to compel the California Federal Court to make an order transferring the said case of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, as prayed for in the petition.

3. This Court lacks jurisdiction to issue a Writ of Prohibition to stay proceedings of the California Federal Court under and pursuant to its order of March 14, 1958.

4. Mandamus does not lie to compel the California Federal Court to vacate its order denying the transfer of said action of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, pursuant to the petition.

5. Mandamus does not lie to compel the California Federal Court to make an order to transfer the said case of *Edward T. Hyde v. Great Northern Railway Company* from San Francisco to Seattle for trial, pursuant to said petition.

6. Prohibition does not lie to stay the action of the California Court under and pursuant to its order of March 14, 1958.

7. The order of the California Federal Court should stand as being in all things correct as a matter of law for the reasons:

    a. The order of the United States District Court, District of Minnesota, Third Division, by the Honorable Robert C. Bell (herein referred to as the Minnesota Federal Court), transferring the case of *Edward T. Hyde v. Great Northern Railway Company* from St. Paul, Minnesota, to San Francisco for the purposes of trial, was, as a

matter of orderly judicial administration, not reviewable by the California Federal Court.

b. The California Federal Court, as the transferee court under Judge Bell's order, lacked jurisdiction to re-examine Judge Bell's transfer order and thereafter to re-order a transfer of the case.

c. The California Federal Court lacked jurisdiction to order a re-transfer of the case for the reason that the transfer power had been exhausted by the transfer order of the Minnesota Federal Court.

d. The California Federal Court was bound by the transfer order of the Minnesota Federal Court as the law of the case.

e. The order of the Minnesota Federal Court, transferring the case of *Hyde v. Great Northern Railway Company* from St. Paul, Minnesota, to San Francisco, California, for trial is *res judicata* as to the validity of the said order.

8. This Court should deny a mandamus and prohibition for the reasons stated in number 7, including paragraphs a, b, c, d and e thereof, even though this Court might otherwise have the power to grant such writs.

9. This Court should deny mandamus and prohibition as being in effect procedures to secure interlocutory review of a non-appealable interlocutory order.

10. This Court should deny mandamus and prohibition in the exercise of sound appellate judicial discretion.

Respectfully submitted,

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United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15975

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA and EDWARD T. HYDE,
Respondents.

BRIEF IN SUPPORT OF RESPONSE AND ANSWER OF THE RESPONDENT, EDWARD T. HYDE

STATEMENT OF FACTS

The case of *Hyde v. Great Northern Railway Company* has a history of change of venue proceedings, which have extended over a period in excess of two years and have prevented the plaintiff from having his case tried. Plaintiff commenced his action against the defendant on February 23, 1956. Thereafter, as appears from the petition herein, the following change of venue proceedings under 28 *U.S.C.A.*, Sec. 1404(a), took place:

1. Motion in Minnesota Federal Court and Order on June 20, 1956, transferring case to Southern District of California, Central Division, at Los Angeles, and denying defendant's Motion to transfer to Seattle, Washington.

2. Motion in United States District Court for Southern District of California, Central Division, and Order of July 3, 1956, re-transferring case to Minnesota Court.
3. Motion and Order of July 12, 1956, of Minnesota Federal Court transferring case to the United States District Court for the Northern District of California, Southern Division, at San Fancisco, for trial.
4. Re-hearing by Minnesota Federal Court on July 31, 1956, and Order of August 2, 1956, denying defendant's Motion to transfer to Seattle, and denial thereof.
5. August 6, 1956, Petition to the United States Circuit Court of Appeals for the Eighth Circuit for Writ of Prohibition and Mandamus to compel vacation of the transfer of the Minnesota Court to the California Court and to compel the transfer of the said action to Seattle for the purpose of trial which were denied on December 18, 1956. (*Hyde v. Great Northern Railway Company* (8 Cir.), 238 F.2d 852.)
6. Petition for re-hearing of decision of the United States Circuit Court of Appeals for the Eighth Circuit denying Mandamus and Prohibition after the filing of briefs and oral arguments on said Petition, and denial thereof. (*Hyde v. Great Northern Railway Company* (8 Cir.), 245 F.2d 537.)
7. Petition to the Supreme Court of the United States to review the decision of the United States Circuit Court of Appeals for the Eighth Circuit which was denied on November 1st, 1957. (355 U.S. 872, 78 S.Ct. 117, ... L.Ed. ....)
8. The proceedings in the California Federal Court subsequent to those above enumerated to compel the transfer of the case from San Francisco to Seattle for trial plus sixteen federal judges, including nine Judges of the Su-

preme Court of the United States, have considered and reviewed the matter of the transfer of the said action to Seattle for the purpose of trial and all sixteen have denied the defendant such a transfer.

This long and tortuous venue litigation prompted the California Federal Court to state (R. 107B):

> "This case already has been almost venued to death. While it has some judicial breath of life left it should be tried on the merits."

Respondents will argue the several points raised in their response. For convenience, some of the points raised in the response will be grouped in connection with the legal propositions which they involve.

NATURE OF VENUE LITIGATION IN MINNESOTA FEDERAL COURT AND U. S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Minnesota Federal Court heard the defendant's motion to transfer under 28 *U.S.C.A.*, Sec. 1404(a), upon the complaint, answer and 22 affidavits filed by the parties, which are printed at pages 1 to 64 of the Record. Judge Bell, at the second hearing of the motion, made the transfer order in question, of August 2, 1956, transferring the case for trial to the Northern District of California, Southern Division, sitting at San Francisco (R. pp. 54-65).

Judge Bell's return to the petition for mandamus or prohibition in the Court of Appeals shows that he painstakingly considered all the evidence presented to him; that he evaluated the evidence and duly considered the same; that he applied to the evidence in making his determination concerning the transfer all applicable to law, including Sec. 1404(a) and the case law construing the statute; and that his decision was a sincere judicial determination of the matter. His

return sets forth these facts in paragraphs II, III, IV and VI thereof at pages 90 to 92 of the Record.

The Court of Appeals held that Judge Bell so acted, as appears from the following excerpt of its opinion (R. p. 5A):

> "Judge Bell, in his return to the defendant's application for a writ of prohibition and mandamus, states that, in transferring the case to the Northern District of California, the Court properly exercised the judicial power and discretion vested in it by Sec. 1404(a), and that the order of transfer was in accordance with that section 'in that it was for the convenience of the parties and witnesses, in the interest of justice.'"

The Court of Appeals, while differing with Judge Bell as to the merits, states (R. p. 6A):

> "* * * we do not question the sincerity of the belief of Judge Bell that the transfer of the plaintiff's case for trial at San Francisco was made in the exercise of a sound judicial discretion and in conformity with the letter and spirit of Sec. 1404(a)."

In an exceptionally able and well considered opinion by Circuit Judge John B. Sanborn, who was a special consultant assisting in drafting Sec. 1404(a) (*Ex parte Collett*, 337 U.S. 55, Note 2, at p. 66, 69 S.Ct. 949, Note 22 at p. 950, ___ L.Ed. ___), the Court said (238 F.2d 852):

> "* * * We are of the opinion, however, that the transfer order is not subject to review by prohibition or mandamus, despite the fact that it is not an appealable order and that an appeal from a final judgment in the case will be an adequate remedy for the erroneous transfer."

Then, after reviewing and considering numerous authorities, the Court further said:

> "The Fourth Circuit in a recent opinion by Chief Judge Parker in the case of Clayton v. Warlick, 232 F.2d 699, has held that, while mandamus or prohibition will lie to compel a District Judge to exercise the discretion conferred upon him by Sec. 1404(a) or to prevent him from transferring a case to a District which, as a

matter of law, it is not transferable, Sec. 1651(a) does not afford a means for the review of an order such as that here involved. The Court said (page 706 of 232 F.2d):

'The correct rule to be applied, we think, is the same as that applied in the case of other interlocutory orders, i.e., where the judge has exercised a power, conferred upon him by law, mandamus may not be availed of to review the exercise of the power in the face of the restriction placed by Congress on the review of interlocutory orders. The distinction which we think applicable was that drawn by the Supreme Court in DeBeers Consolidated Mines, Ltd., v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566, where the Court said:

'When Congress withholds interlocutory reviews, Sec. 262 (now 28 U.S.C., Sec. 1651) can, of course, not be availed to correct a mere error in the exercise of concealed judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of Sec. 262.'

"* * * We find ourselves in complete accord with the opinion in Clayton v. Warlick, supra. As Chief Judge Parker says in that opinion, the expression of the various circuits with respect to reviewability of orders of transfer under Section 1404(a), through the use of Section 1651(a), are in hopeless conflict."

And, finally, the Court concluded:

"So far as this Court is concerned, we shall hereafter grant leave to apply for mandamus or prohibition to review transfer orders if and when an Act of Congress or a decision of the Supreme Court requires us to do so. We think that, in the interest of an expeditious, efficient and orderly administration of justice, controversies about venue should be finally settled and determined at the District Court level."

After the Court of Appeals had denied mandamus or prohibition the petitioner obtained a rehearing of the single question as to whether the rules it applied in deciding the

case had been altered or changed by the Supreme Court of the United States in *La Buy v. Howes Leather Co., Inc.,* 352 U.S. 249, which was rendered after the Court of Appeals had rendered its decision (245 F.2d 537).

Finally, petitioner applied to the Supreme Court of the United States for certiorari to review the decision of the Court of Appeals. Certiorari was denied, 355 U.S. 872, 78 S.Ct. 117, ___ L.Ed. ___.

Thereafter, the petitioner applied to Judge Bell for a rehearing of its motion to transfer to Setttle, which was denied.

The California Federal Court Decision.

After all the foregoing venue litigation in the Minnesota Federal Court, the United States Court of Appeals for the Eighth Circuit, the petition to the Supreme Court of the United States for certiorari, and motion for rehearing before Judge Bell, after all the foregoing proceedings had been had, the relator-petitioner here made a motion in the California Federal Court to transfer the case for trial from San Francisco to Seattle, which motion and the affidavits in support thereof, with the exception of some affidavits to show that, subsequent to Judge Bell's order denying the last motion for a rehearing, plaintiff Hyde had made a trip from Long Beach, California, to Seattle by automobile and that two doctors at the Long Beach Veteran's Hospital would not go to either Seattle or San Francisco to be witnesses for plaintiff, were identical with original motion to transfer before Judge Bell and the affidavits filed in support thereof.

The California Federal Court, in a carefully considered and scholarly opinion, reviewed all the facts concerning the venue litigation relative to the *Hyde* case and said (R. 106B to 107B):

> "The parties admit that the Northern District of California is a District in which the action might have been

brought originally, since the defendant does business in this District and is subject to the service of process in this District. Under Section 1404(a) it is obvious that the Northern District of California is a District where the action might have been brought, and that, therefore, this Court has jurisdiction. See: Shapiro v. Bonanza Hotel Co., 9th Cir., 185 F.2d 777. The effect of defendant's contention is to ask this Court to review the order of the Minnesota Court and to determine that under the facts herein stated the Minnesota Court was acting in excess of its jurisdiction because of abuse of discretion, and therefore the action should be remanded to the Minnesota Court. Regardless of what the decision of this Court would have been had defendant's motion been made to this Court in the first instance, considerations of comity require that this Court should not review the decision made by the Minnesota Court. See the opinion of Chief Judge Roche in the case of Rinaldi v. The Elizabeth Bakke, N.D. Cal. S.D., 107 F. Supp. 975; and Gulf Research & Development Co. v. Schlumberger Well Sur. Corp., 98 F. Supp. 198.

"The considerations of comity also dispose of defendant's second contention that this Court should again review the facts and transfer the case to the Western District of Washington, Northern Division, and in effect reverse the order of the Minnesota Court. The Minnesota Court is a Court of co-ordinate jurisdiction with this Court, exercising the same powers and discretion under Section 1404(a). For this Court to attempt to review the decision of the Minnesota Court on substantially the same facts and circumstances would be both unseemly and unwise. The Court of Appeals for the Eighth Circuit, the review court for the Minnesota Court, has refused to interfere with the order of transfer made by the Minnesota Court at this stage of the proceedings, and the Supreme Court has refused to grant certiorari. To grant defendant's motion would bring about an unseemingly conflict between this Court and the Minnesota Court, when the ultimate conflict can be solved only by a higher appellate court. The granting of defendant's motion would again start the processes of appellate consideration of the jurisdiction of this

> Court to make a transfer under Section 1404(a), after one transfer had been made already by a court of coordinate jurisdiction. This case already has been almost venued to death. While it has some judicial breath of life left it should be tried on the merits."

With all the foregoing venue litigation behind us, in which federal courts at all levels from the United States District Courts to the Supreme Court of the United States have, without exception, denied relator-petitioner's efforts to transfer the case for trial to Seattle and with over two years and some months' delay of the trial, relator-petitioner now asks leave to file a petition for mandamus or prohibition to obtain, if possible, from this Court the very transfer order which all the foregoing federal courts have consistently denied to it.

The response states the points upon which respondent shall rely, as reasons why this Court also should deny relator-petitioner such relief.

ARGUMENT

I.

THIS COURT, BEING AUTHORIZED BY 28 U.S.C.A., SEC. 1651, TO ISSUE MANDAMUS AND PROHIBITION ONLY AGREEABLE TO THE USAGES AND PRINCIPLES OF LAW, SHOULD DENY BOTH WRITS AS BEING CONTRARY TO SUCH USAGES AND PRINCIPLES.

(This covers points 1, 2, 3, 4, 5 and 6 of the Response and Answer.)

The power of this Court, to issue writs of mandamus and prohibition, as a United States Court of Appeals, is conferred upon the Court by 28 *U.S.C.A.*, Sec. 1651, commonly known as "The All Writs Statute," which, so far as here material, provides in Sec. 1651(a) that such courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The statute, by the use of the conjunctive "and," plainly prescribes the existence of two requirements for the issuance of a writ of mandamus or prohibition, viz.:

1. The existence of a case, where such a writ is necessary or appropriate in aid of the jurisdiction of the United States Court of Appeals; and,
2. The issuance of the writ in the particular case would be "agreeable to the usages and principles of law."

These are concurrent requirements. If either of them is absent in the particular case, the issuance of a writ in mandamus in such a case is not authorized.

Section 1651, authorizing the issuance of writs by the United States Courts of Appeals, should be construed, as we shall show later, in connection with 28 *U.S.C.A.,* Sec. 1291, which defines the appellate jurisdiction of such courts, Rule 73 of the *Federal Rules of Civil Procedure;* and 28 *U.S.C.A.,* Sec. 1292, which enumerates the interlocutory orders from which an appeal may be taken as follows: (1) orders granting injunctions; (2) orders appointing or refusing to appoint receivers, etc.; (3) certain orders in admiralty cases; and (4) certain orders in patent infringement cases. Section 1291 authorizes appeals only from "final decisions of the district courts." Rule 73 prescribes the appellate procedure only in those cases "where an appeal is permitted by law from a district court." The enumeration in Section 1292 of the appealable interlocutory orders does not comprehend orders made under 28 *U.S.C.A.,* Sec. 1404(a), for a change of venue.

(a) Mandamus does not lie according to well settled usages and principles of law to review and set aside an interlocutory decision of a District Court.

The cases cited below establish beyond question that an order to transfer under Section 1404(a) made on a motion is an interlocutory order. The rule is established by all the decisions of the Supreme Court of the United States, including its first, last and all intermediate pronouncements upon the question and also by the decisions of this Court, which has not only consistently, but also correctly, followed those decisions. We shall cite only some of the cases, but at the same time shall cite some standard texts where these decisions are collected in a veritable array of authority.

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106;

Ex parte Collett, 337 U.S. 55, 69 S.Ct. 994, 98 L.Ed. 1207;

Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041;

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185;

Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379;

United States v. Lawrence (1795), 3 Dall. 42, 1 L.Ed. 502;

Great Northern Railway Co. v. Edward T. Hyde (8 Cir.), 238 F.2d 852, 245 F.2d 537, cert. den. 355 U.S. 872, 78 Sup.Ct. 117;

Clayton v. Warlick (4 Cir.), 232 F.2d 699;

In re Josephson (1 Cir.), 218 F.2d 174;

Carr v. Donohue (8 Cir.), 201 F.2d 426;

Larsen v. Nordbye (8 Cir.), 181 F.2d 765;

United States v. Nordbye (8 Cir.), 75 F.2d 744;

United States, etc., v. Maine Potato Growers, etc., 88 F.2d 780, 66 U.S. D.C. App. 398.

The authorities are collected in 35 *Am. Jur., Mandamus,* Secs. 258-259.

The case of *United States v. Lawrence,* supra, decided in 1795, was the first one to come before the Supreme Court of the United States in which it was sought, as here, to compel a district judge to decide a case in a particular way. In that case Judge Lawrence had, by an order, decided that the evidence presented to him was insufficient to authorize the issuance of a warrant to seize a ship. In holding that mandamus would not lie, the Court said (4 Dall. 53, 1 L.Ed. 507) :

> "We are clearly and unanimously of opinion, that a *mandamus* ought not to issue. It is evident that the District Judge was acting in a judicial capacity when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre; and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment, but his own."

In the last case of the Supreme Court of the United States deciding this question, *Bankers Life & Casualty Co. v. Holland,* supra, the Court reviewed many of its prior decisions. In that case, the Court granted an order of severance and transfer of the case as to one defendant on the ground that the venue laid was improper as to-wit. The Court said (346 U.S. 382-383, 74 S.Ct. 147-148) :

> "The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C., Sec. 1561(a), 28 U.S.C.A., Sec. 1651(a). As was pointed out in Roche v. Evaporated Milk Ass'n (1943), 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185, the 'traditional use of the writ in aid of appellate jurisdiction both at common

law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Here, however, petitioner admits that the court had jurisdiction both of the subject matter of the suit and of the person of Commissioner Cravey and that it was necessary in the due course of the litigation for the respondent judge to rule on the motion. The contention is that in acting on the motion and ordering transfer he exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. Ex parte American Steel Barrel Co. (1913), 230 U.S. 35, 45-46, 33 S.Ct. 1007, 1010, 1011, 57 L.Ed. 1379; Ex parte Roe (1914), 234 U.S. 70, 73, 34 S.Ct. 722, 723, 58 L.Ed. 1217. Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, Roche v. Evaporated Milk Ass'n, supra, and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' of the sort held to justify the writ in De Beers Consolidated Mines v. United States (1945), 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566. This is not such a case."

The Court further pointed out that the statutes defining the cases in which the courts of appeal have jurisdiction not only excluded by the clearest implication a right of review in other cases by other writs, such as mandamus, but also that the Congress must have contemplated that the District Courts might commit error by interlocutory orders and that such errors were to be reviewed and corrected by appeal only in the cases where the statutes authorized such appeals. The other decisions of the Supreme Court cited above use language similar to that which we have just quoted above from the *Bankers Life & Casualty* case.

In the case of *Carr v. Donohue,* supra, the Court held that mandamus and prohibition should not be issued to prevent a district judge from transferring under Section 1404(a) an act commenced in the United States District Court.

In the case of *Larsen v. Nordbye,* supra, the Court held that writ of mandamus would not issue to compel a district judge to permit the plaintiff, in an action commenced in the District Court, to dismiss without prejudice after the Court had ordered the case transferred from the District of Minnesota to the Southern District of Iowa. The Court said (181 F.2d 766):

> "It (a writ of mandamus) may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers or officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision."

(b) Prohibition does not lie according to well settled usage and principles of law to review and set aside an interlocutory decision of a District Court.

This rule is well settled. It makes no difference in the application of the rule whether the petitioner claims that the trial judge erred or whether the appellate court is of the opinion that error actually occurred below.

Ex parte Johns, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110;
U. S. v. Hoffman, 4 Wall. 158, 18 L.Ed. 354;
42 *Am. Jur., Prohibition,* Sec. 30, pp. 165-166;
73 *C.J.S., Prohibition,* Sec. 10, pp. 30-31;
50 *C.J., Prohibition,* Sec. 18, pp. 662-663.

Mr. Justice Miller, speaking for the Court in *U. S. v. Hoffman,* supra, aptly said (18 L.Ed. 355):

> "The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing be already done, it is manifest the writ of prohibition cannot undo it, for that would require an affirmative act; * * *."

The pertinent part of the text in 42 *Am. Jur., Prohibition,* Sec. 30, supra, reads (42 *Am. Jur.*, pp. 165-166):

> "* * * or, as it has sometimes been said, the writ of prohibition cannot be converted into, or made to serve the purpose of, an appeal, writ of error, or writ of review to *undo* what already has been done."

Prohibition does not lie here for the reason that to do so would be to use the writ as an interlocutory appeal from an interlocutory order for the purpose of reviewing such order after it has become final. This would be directly contrary to well settled usage and legal principles and consequently contrary to the express provisions of 28 *U.S.C.A.,* Sec. 1651, the all writs act.

(c) Mandamus does not lie to review or reverse an interlocutory decision of a district judge or to decide a case differently from what he has already done.

Mandamus cannot be used as an interlocutory appeal to review interlocutory orders. The granting of a writ of mandamus to compel a district judge to vacate an order made by him or to decide a motion in a particular way contrary to what he has already decided would be not only an interlocutory review of an interlocutory decision not authorized by law, but also would be a substitution by the appellate court of its views for those of the trial court with respect to a matter committed by law to the trial court for its exclusive decision.

In *Roche v. Evaporated Milk Ass'n,* supra, the United States Court of Appeals, by mandamus, ordered the District Court to reinstate certain pleas in abatement, which the District Court had ordered stricken by an interlocutory order, and then to hear and decide such pleas. Mr. Chief Justice Stone, speaking for the Court, said (319 U.S. 25-26, 635 S.Ct. 941):

> "The common-law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. Ex parte Republic of Peru, supra, 63 S.Ct. 797, and cases cited; Whitney v. Dick, 202 U.S. 132, 136, 140, 26 S.Ct. 584, 586, 587, 50 L.Ed. 963. Hence the question presented on this record is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the

ruling; *and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.*" (Emphasis supplied.)

The Court further said, as did the Court in *Carr v. Donohue,* supra, at 201 F.2d 428 (139 U.S. 27-30, 63 S.Ct. 942-944):

> "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been subscribed or to review an appealable decision of record. * * * citing cases * * *. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C., Sec. 225(a), 28 U.S.C.A. Sec. 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times, before there would be a final judgment.'" * * * (Citing cases.)

In the case of *Ex parte Steel Barrel Company,* supra, where the Supreme Court of the United States denied a writ of mandamus to compel a judge of the Court of Appeals to

vacate an order designating a district judge to hear and decide a matter in bankruptcy, Mr. Justice Lurton, speaking for the Court, said (230 U.S. 46, 57 L.Ed. 1384):

> "Judge Lacombe was clearly called upon to determine, in the exercise of his jurisdiction as the senior circuit judge, whether the situation was one in which he should designate a judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under Sec. 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. Ex parte Burtis, 102 U.S. 238, 26 L.Ed. 392; Re Parson, 150 U.S. 150, 37 L.Ed. 1034, 14 Sup. Ct. Rep. 50."

In *United States v. Nordbye* (8 Cir.), 75 F.2d 744, the Court denied a writ of mandamus to compel a district judge to allow an appeal. The Court said (75 F.2d 745):

> "Mandamus is ordinarily a remedy for official inaction, and not to compel the undoing of acts already done, or to correct wrongs already perpetrated."

The effect of granting the writ here would not only be to "undo" what Judge Bell has decided, but also for this Court to decide a question which Section 1404(a) has committed to Judge Bell as a district judge for his decision.

In the case of *Ex parte Newman,* 14 Wall. 152, 20 L.Ed. 877, the Court held that mandamus would lie to counsel a lawyer or court to take jurisdiction of a case and to exercise judicial power and discretion, but "without any direction as to the manner in which it shall be done."

The views above expressed have been adopted as the rule of other courts.

Hydraulic Press Mfg. Co. v. Moore (8 Cir.), 185 F.2d 800;

Carr v. Donohue, supra;

United States v. Nordbye (8 Cir.), 75 F.2d 744;
Federal Savings & Loan Ass'n v. Reeves (8 Cir.), 148 F.2d 731.

(d) Prohibition does not lie to undo decisions already rendered.

What has been said under (b), supra, would suffice.

Ex parte Johns, 191 U.S. 93, 24 S.Ct. 27, 48 L.Ed. 110;
U. S. v. Hoffman, 4 Wall. 158, 18 L.Ed. 110;
42 *Am. Jur., Prohibition,* Sec. 30, pp. 165-166.

The latest expression of the Supreme Court of the United States warns that, although the Courts of Appeal have issued writs of mandamus and prohibition in cases arising, Section 1404(a), neither the bench nor the bar were warranted in assuming that either of such writs is a "proper remedy." In *Norwood v. Kirkpatrick,* 349 U.S. 29, 75 S.Ct. 544, the Court said (349 U.S. 33):

> "Since we find that the district judge properly construed Sec. 1404(a), it is unnecessary to pass upon the question of whether mandamus or prohibition is a proper remedy."

(e) Mandamus and prohibition would be futile in this case and therefore should not be granted.

Mandamus and prohibition are not only not appropriate as remedies, but also to grant either one of them would be futile for the reason that the order which was made below transferring the case divested the court below of jurisdiction and rendered it impotent to take any further action with respect to the matter.

In *Sims v. Union News Co.* (D.C., S.N.Y.), 120 F.Supp. 116, 117, it was held that a voluntary dismissal by plaintiff was ineffective after the Court had ordered the transfer of the action under Section 1404(a), even though the clerk had not physically transferred the papers. The Court said:

"(2) The fact that the clerk has not yet physically transferred the papers to the Eastern District of South Carolina because plaintiff's counsel by letter of February 11, 1954, requested him not to do so, does not alter my belief that this cause has been effectively transferred out of this jurisdiction."

(f) This Court has adopted the rule that mandamus and prohibition do not lie to review an order denying a transfer under 28 U.S.C.A., Sec. 1404(a).

Carr v. Donohue (8 Cir.), 201 F.2d 426.

The rule laid down in *Carr v. Donohue,* supra, is in accord with the decisions of the Supreme Court of the United States in cases which we have cited supra. Most of these decisions were reviewed in *Carr v. Donohue,* supra.

In *Ford Motor Co. v. Ryan* (2 Cir.), 182 F.2d 329, Judge Frank held that mandamus would lie for the reason that an erroneous decision with respect to transfer was "incorrectible on appeal" from the judgment. (182 F.2d 330.) Judge Learned Hand expressed no views with respect to the appropriateness of mandamus as a remedy. Judge Swan dissented from the views of Judge Frank. All three of the judges voted to deny mandamus because defendant had failed to sustain the burden of proof as the moving party. Judge Frank's view that an interlocutory order denying transfer is not reviewable on appeal and that lack of right of review was a ground for granting mandamus is squarely opposed to the views of the Supreme Court of the United States and of this Court in the following cases:

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106;

Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041;

Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185;

Carr v. Donohue (8 Cir.), 201 F.2d 426;
United States v. Nordbye (8 Cir.), 75 F.2d 744.

As said in *Roche v. Evaporated Milk Ass'n,* supra (319 U.S. 29-30):

> "Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C., Sec. 225(a), 28 U.S.C.A., Sec. 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they alleged, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments would be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. Cobbledick v. United States, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a 'plain evasion' of the Congressional enactment that only final judgments be brought up for appellate review. 'The effect, therefore, of this mode of interposition, would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times, before there would be a final judgment.'"

In *Carr v. Donohue,* supra, the Court held that an order granting or denying transfer under Section 1404(a) was reviewable on appeal fom the final judgment. Except for Judge Frank's statements, which seemingly were intended to be not a statement of law, but one of fact forecaste as to what might happen, is the only statement in the books to the contrary.

The case of *Paramount Pictures v. Rodney* (3 Cir.), 186 F.2d 111, expressly holds that an order denying transfer is appealable, and that mandamus will lie to compel transfer where a district judge decides it. The decision in that case is based upon the views of Judge Frank in *Ford Motor Co. v. Ryan,* supra, to the effect that such a view is not only erroneous but is in defiance of Section 1651, which permits appeals only from final judgments. It is also contrary to all the decisions of the Supreme Court of the United States which we have cited supra.

The case of *Atlantic Coastline R. Co. v. Davis* (5 Cir.), 185 F.2d 766, is based in part upon the assumption that decisions of the Supreme Court of the United States in cases such as *Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207, and cases like *McClellan v. Carland*, 217 U.S. 268, 30 S.Ct. 501, and similar cases "tacitly" authorize the issuance of such writs. These cases are not in point for the reason that the question whether mandamus is an appropriate remedy was not raised in *Ex parte Collett*, supra, and similar cases. Nothing is said in the briefs or the decisions relative to that question. Consequently, nothing was decided by those cases relative to the question. On the contrary, the Supreme Court of the United States, in the later case of *Norwood v. Kirkpatrick,* expressly warned that it would ont hold that either mandamus or prohibition was the proper remedy. This warning was to apprise the bench and bar that the Supreme Court of the United States intended to adhere to its prior decisions holding that neither mandamus or prohibition were proper remedies in such case. The case of *McClellan v. Carland* was not in point because decision there was simply with respect to a preliminary jurisdictional question. Such a decision is reviewable to compel a judge to take jurisdiction.

Ex parte Simons, 247 U.S. 231, 38 S.Ct. 397;

Barber Asphalt Paving Co. v. Morris (8 Cir.), 132 Fed. 945;

35 *Am. Jur.,* Sec. 255.

All these cases are distinguished in the case of *Roche v. The Evaporated Milk Ass'n* in the elaborate opinion by Mr. Chief Justice Stone.

The case of *Nicol v. Koscinski* (6 Cir.), 188 F.2d 537, is not in point because this point was not raised in that case. See *Chicago, R. I. & P. R. Co. v. Igoe,* 212 F.2d 378 at 380.

Wiren v. Laws (D.C.), 194 F.2d 873, holds that mandamus will lie because an order granting or denying transfer under Section 1404(a) is not appealable and that a review by mandamus is therefore necessary to correct the error, if any, in the order thus brought up for review. This decision follows *Ford Motor Co. v. Ryan,* supra, and the reasoning of Judge Frank in that case. It is obviously unsound for the reasons that we have mentioned.

In the case of *Shapiro v. Bonanza Hotel Co., Inc.* (9 Cir.), 185 F.2d 777, the Court holds that an order granting or reviewing transfer under Section 1404(a) is not appealable and therefore mandamus is a proper remedy to bring such orders up for review to correct any errors therein. In this respect the cited case follows the views of Judge Frank in *Ford Motor Co. v. Ryan,* supra, quoting that case. We have already pointed out that the decision is unsound, is contrary to the provisions of Section 1651 and should not be followed.

The case of *Chicago, R. I. & P. R. Co. v. Igoe* (7 Cir.), 212 F.2d 378, likewise is unsound for the following reasons: (1) it declined to follow the rule of this Court in *Carr v. Donohue,* 201 F.2d 426, supra; (2) it adopted the rule of cases like *Ford Motor Co. v. Ryan* (2 Cir.), 182 F.2d 329, and the other cases which defendant has cited and which we have distinguished, supra, and therefore is based on unsound rules; (3) the Court misconstrued the decisions of the Su-

preme Court of the United States in *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, and *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, in that it failed to recognize that these cases squarely hold that an interlocutory order can never be reviewed by mandamus or prohibition; and (4) that the Court erred in holding that review of an interlocutory order granting or denying transfer under Section 1404(a) was implicit in such cases as *Ex parte Collett,* 337 U.S. 55, supra, *Kilpatrick v. Texas & P. R. Co.,* 337 U.S. 75, and *United States v. National City Lines,* 337 U.S. 78, for the reason that the point as to the appropriateness of either mandamus or prohibition as a remedy was not raised in any one of the cited cases and therefore none of such cases should be determined an authority that either of said writs is an appropriate remedy in such a case. See *Norwood v. Kirkpatrick,* supra.

The rule laid down in the case of *Hyde v. Great Northern Railway Co.,* supra, should be adhered to because it is sound in principle and in accordance with the decisions of the Supreme Court of the United States. We think the authorities that we have cited supra adequately cover this proposition. After all, the primary concern of the Court is to establish and maintain sound legal doctrine which is just as much a concern of the bench and bar as it is that we have sound money.

Interlocutory review by mandamus and prohibition of the order of the California Federal Court is impliedly denied by 28 *U.S.C.A.*, Sec. 1292, which defines the appellate jurisdiction of this Court under Rule 73 of the *Federal Rules of Civil Procedure.* Section 1292 enumerates the interlocutory orders which are reviewable on appeal. This section does not enumerate orders for the transfer of cases under Sec. 1404(a) from one district to another for the purpose of trial. The enumeration does not include such transfer orders.

Thus, the plain implication is that there shall be no interlocutory review of such orders.

II.

THE CALIFORNIA FEDERAL COURT, AS THE TRANSFEREE COURT, PROPERLY REFUSED TO RE-EXAMINE THE TRANSFER ORDER MADE BY THE MINNESOTA FEDERAL COURT UPON THE GROUNDS OF ORDERLY AND JUDICIAL ADMINISTRATION AND COMITY.

(This covers point 7a of the Response and Answer.)

The court below applied the rule stated in the caption and held:

> "The effect of defendant's contention is to ask this Court to review the order of the Minnesota Court and to determine that under the fact therein stated the Minnesota Court was acting in excess of its jurisdiction because of abuse of discretion, and therefore the action should be remanded to the Minnesota Court. Regardless of what the decision of this Court would have been had defendant's motion been made to this court in the first instance, considerations of comity require that this Court should not review the decision made by the Minnesota Court. See the opinion of Chief Judge Roche in the case of Rinaldi v. The Elizabeth Bakke (N.D. Cal. S.D.), 107 F. Supp. 975, and Gulf Research & Dev. Co. v. Schlumberger Well Sur. Corp."

The court below applied in its decision well settled applicable rules of law which are laid down by the following authorities:

Rinaldi v. The Elizabeth Bakke (D.C. N.D. Cal. S.D.), 107 F. Supp. 975.

Internatio-Rotterdam, Inc., v. Thomsen (4 Cir.), 218 Fed. 514.

Gulf Research & D. Co. v. Schlumberg Well Sur. Corp. (D.C. De.), 98 F. Supp. 198, affirmed (3 Cir.) 193 F.2d 302.

United States v. 23 Gross Jars, etc. (N.D. Oh. E.D.), 86 F. Supp. 824.

54 *Am. Jur., United States Courts,* 1957 Pocket Parts, page 106, note 10:35.

Anno.: 99 *L.Ed.* 805.

One of the leading cases, if not the leading case, on this question is *Rinaldi v. The Elizabeth Bakke,* supra, which was decided by the California Federal Court in a decision by Chief Judge Roche in which a libel proceeding against a vessel had been transferred by the Federal Court in New York to the California District Court for trial. In denying the motion, the Court pointed out that three other district judges had considered the jurisdictional question involved and had ruled against the owners of the vessel. The Court said (107 F. Supp. 976):

> "It is apparent from the foregoing that not one but three District judges have considered the jurisdictional question that respondent vessel has raised before this court. Respondent is thus seeking, in effect, to have this court assume the role of an appellate court in re-examining the question. This, by reason of the principle of comity and considerations for the orderly functioning of the judicial process, this court declines to do. Should this court ignore the considered judgment of the New York judges and transfer the proceedings back to the Southern District of New York, they would be under no compulsion to accept the transfer. To paraphrase the language of Chief Judge Leahy in Gulf Research & Development Co. v. Schlumberger Well Surveying Corp. (D.C.), 98 F. Supp. 198, under such circumstances this case could conceivably shuttle back and forth interminably between California and New York. Such an eventuality should be avoided."

In the case of *Gulf Research & D. Co. v. Schlumberger Well Sur. Corp.,* supra, Judge Harrison of the Southern District of California transferred a patent case to the District Court

of Delaware for trial. In denying a motion to remand the case to the Southern District of California, the Court said (98 F.2d 201):

> "Regardless of my own view as to whether the California Court was right in its interpretation of Sections 1391(c) and 1400(b), and, admittedly, there is serious conflict as to the proper interpretation of those sections, I do not think it meet or proper that I review Judge Harrison's decision on the merits. To do so would be a usurpation of an appellate function; and on at least one other occasion I have refused to so act. Though counsel for plaintiff and defendant have addressed themselves both in their briefs and oral argument to the merits of Judge Harrison's holding on the venue question, all of the contentions on the merits were before Judge Harrison. It is now for an appellate court—not for me—to correct any error, if error there be, in his opinion. It is not only the principle of comity and the fact that Judge Harrison's opinion may be likened, at this stage, to the 'law of this case' which compels me to this conclusion, but what seems of most importance to me are the considerations for the orderly functioning of the judicial process. If I should grant plaintiff's motion and say, in effect, to Judge Harrison, 'You were wrong in transferring this case to Delaware,' I do not think he, in turn, would be any more bound to take and try the case on the merits, thereby respecting my views, than I had shown myself to be in ignoring his considered judgment. If both Judges Harrison and I were obdurate in our positions, this case could conceivably shuttle back and forth interminably between California and Delaware. Such an eventuality should be avoided."

This Court, in the *Rinaldi* case, supra, approved the language which we have quoted. Judge Leahy's decision in the cited case was affirmed by the Court of Appeals for the Third Circuit, 218 F.2d 514, which in turn cited the case of *Rinaldi v. The Elizabeth Bakke*, supra, with approval and used it as the authority upon which it affirmed Judge Leahy's decision.

There are some exceptions to the rule above stated based upon factors not involved here as, for example, (1) where either the transferor or the transferee court lacks jurisdiction of the case, *Wilson v. Kansas City Southern Ry. Co.* (W.D. Mo.), 101 F. Supp. 56, (2) where no trial is necessary and the case can be disposed of in the district where sued upon a motion to dismiss under Rule 12 or otherwise, *Bohnen v. Baltimore and Ohio Chicago Terminal R. Co.* (D.C. N.D. Ind.), 125 F. Supp. 463; (3) or where the parties stipulate for a change of venue, *United States v. United States District Court* (8 Cir.), 226 F.2d 238.

It is noteworthy that at least in the *Rinaldi* case and in the *Gulf Research & D. Co.* cases, supra, the judges who held the motions to re-transfer gave great weight to the decisions of the judges who made the transfers. This would seem to be the proper thing to do as a matter of orderly judicial administration and the respect and comity of courts of equal jurisdiction should show to each other. Accordingly, the California Federal Court properly refused to re-examine the transfer order of the Minnesota Federal Court.

III.

THE CALIFORNIA FEDERAL COURT, AS THE TRANSFEREE COURT, LACKED JURISDICTION TO RE-EXAMINE THE TRANSFER ORDER OF THE MINNESOTA FEDERAL COURT AND TO THEREAFTER RE-TRANSFER THE CASE.

(This covers points 7b and e.)

The theory of the decisions, which support the rule as stated in the caption (and, so far as we know, there are none to the contrary) is that only an appellate court may review the decisions of any court and then only the decisions of an inferior court upon an appeal or other review proceedings, and that a court lacks jurisdiction to sit in review of the decision of a court of equal jurisdiction, especially where, as here, there is no statutory provision for such review. The exception to the rule is that a court may always examine an order or judgment for lack of jurisdiction of the particular court to render it.

Atlantic Coast Line R. Co. v. Davis (5 Cir.), 185 F.2d 766.

United States v. United States District Court (6 Cir.), 209 F.2d 575.

Hassen v. United States (D.C. E.D. N.W.), 66 Fed. Supp. 759.

In *Atlantic Coast Line R. Co. v. Davis,* supra, the United States District Court for the Southern District of Florida twice tried a case which had been transferred to that district from New York. After two trials, which resulted in disagreements of the juries, the District Court re-transferred the case to New York for trial. The United States Court of Appeals indicated that by so doing the District Court acted without jurisdiction and said (185 F.2d 769):

> "We are of the opinion that the grounds upon which the Court rested his decision ordering the re-transfer

> are so wholly insufficient to support the order and to bring it within the terms of Section 1404(a), supra, that the order re-transferring the case, in substance, evidences an unwarranted renunciation of jurisdiction, if not also an act beyond the Court's jurisdiction, * * *."

Further, the Court of Appeals said that it was the duty of the District Court to try the case and said (185 F.2d 770):

> "Under the circumstances of this case, the re-transfer evidenced the renunciation or abandonment of a jurisdiction the Court was legally required to exercise in order to terminate the cause lawfully pending before it."

In *United States v. United States District Court*, supra, a criminal case was transferred from the Middle District of Tennessee to the Eastern District of Tennessee, Northern Division. In denying a motion of the defendant to re-transfer the case to the court where it originated, the Court of Appeals said (209 F.2d 577):

> "A motion to transfer a criminal prosecution begun in one federal district court having jurisdiction of the subject matter, to another district also having jurisdiction is addressed to the discretion of the district judge to whom presented; and his order transferring the case for trial in the other district is not reviewable by the judge of the latter district. See Holdsworth v. United States (1 Cir.), 179 F.2d 933."

Similar views are expressed by District Judge Byers in *Hassen v. United States* which involved the transfer of a libel in admirality.

The jurisdiction to order a transfer is vested in the Court which hears the motion to transfer. The transferee court is in duty bound to accept the transfer under the rule, whether it agrees with the decision for the transfer or not. This would seem to be a salutary rule in order to facilitate the trial and disposition of cases and to avoid shuttling litigants from one court to another according to the divergent views

of the numerous judges who compose the federal judicial system.

IV.

THE TRANSFER ORDER MADE BY THE MINNESOTA FEDERAL COURT ACCORDING TO THE STATUTE EXHAUSTED ALL JURISDICTION OF THE FEDERAL COURTS TO ORDER ANOTHER TRANSFER IN INVITUM.

(This covers points 7b and c.)

The rule stated in the caption may have its ramifications in the question of jurisdiction and it may be true that where the Court has exhausted its jurisdiction it also lacks jurisdiction. However that may be, plaintiff desires to avoid getting into any controversy as to whether exhaustion of jurisdiction also results in lack of jurisdiction. The plain fact is, however, that some of the federal courts of very high standing have taken the position that where a court has made a transfer pursuant to statutory authority that the exercise of the power exhausts it and no further power remains in any court thereafter to be exercised with respect to the matter.

United States v. United States District Court (8 Cir.), 226 F.2d 238.

United States v. Six Dozen Bottles, etc. (D.C. E.D. Wis.) 55 F. Supp. 458.

The courts in the cases which are cited above draw a sharp distinction between a transfer upon stipulation and one upon motion which is opposed by the parties.

In *United States v. United States District Court,* supra, the case in the trial court was a proceeding under the Federal Food, Drug and Cosmetic Act to condemn certain articles. The case was transferred upon order of court in invitum from a district in Tennessee to a district in Arkansas. Thereafter the parties stipulated to transfer the case from said

district in Arkansas to another district in Arkansas which better suited their convenience. The Court of Appeals for the Eighth Circuit held that there could be only one transfer by order in invitum but that there might be other transfers upon stipulation. The Court said, quoting the *"Kuriko"* case (226 F.2d 242):

> "In United States v. Six Dozen Bottles, More or Less, of 'Dr. Peter's Kuriko' (D.C. E.D. Wis. 1944), 55 F. Supp. 458, 459, the court denied a second request by claimant for a compulsory removal. In the opinion, Judge Duffy, now Judge of the United States Court of Appeals, 7th Circuit, said:
>
> " 'The power of removal is exclusively conferred under the act upon the court of original jurisdiction, *barring of course the existence of a stipulation of the parties on the subject. As the latter element does not obtain in the instant situation, this court has no power to grant the requested removal.* In other words, the right to removal is completely exhausted and no longer exists in this proceeding.' " (Emphasis supplied.)

The Court further held, on the same page, that the Court may order a further transfer upon stipulation of the parties. That question is not important here because there is no stipulation of the parties for the transfer of the instant case.

V.

THE CALIFORNIA FEDERAL COURT WAS BOUND BY THE TRANSFER ORDER OF THE MINNESOTA FEDERAL COURT UNDER SECTION 1404(a) AS THE LAW OF THE CASE.

(This covers point 7d.)

It is elementary, of course, that the transfer of an action from one district to another merely transfers the case in its status as it was in the transferring district. No change is effected in the case. The right of action itself, as well as all rulings made up to the time of transfer, are reserved and carried forward into the transferee court.

Norwood v. Kirkpatrick, 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789.

Magnetic Eng. and Mfg. Co. v. Dings Mfg. Co. (2 Cir.), 178 F.2d 866.

Bouten v. Shoulders (W.D. Ken.), 116 F.Supp. 391.

In short, the transferee court takes the case from the transferor court in its exact status in the transferor court.

As said in *Magnetic Eng. and Mfg. Co. v. Dings Mfg. Co.,* supra, by Circuit Judge Learned Hand in a case involving the effect of a transfer from New York to Wisconsin (178 F.2d 868):

> "However, when an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has been done."

In *Bouten v. Shoulders*, supra, where a case had been transferred from the Western District of New York to the Western District of Kentucky, the Court said (116 F. Supp. 393):

> "I feel, however, that since an order has been entered transferring this case to this district, the matter of jurisdiction has been determined by the judge of the Western District of New York and is the law of the case."

VI.

THIS COURT SHOULD DENY MANDAMUS AND PROHIBITION FOR THE REASON STATED ABOVE EVEN THOUGH THIS COURT MIGHT OTHERWISE HAVE THE POWER TO GRANT SUCH WRITS.

(This covers point 8.)

The rule with respect to the power stated in the caption is settled by the decision of this Court in *Gulf Research & Dev. Co. v. Harrison, Dist. Judge,* 185 F.2d 457.

In the cited case a Petition for a Writ of Mandamus to compel Judge Harrison to withdraw an order transferring a case for the Southern Division of California, Central Division, to the District of Delaware, for trial under 28 *U.S.C.A.*, Sec. 1404(a), this Court denied the petition in an opinion written by Circuit Judge Orr who, speaking for the Court, said:

> "In this case, no extraordinary circumstances have been called to our attention. Petitioner alleges nothing more than an erroneous application of the law. The error, if any, will be reviewable on appeal to the Court of Appeals for the Third Circuit, after the final judgment has been entered. Mandamus cannot be subverted to perform the function of an interlocutory appeal, over which we have no jurisdiction. The inconvenience of proceeding to what may be an unnecessary trial has long been recognized as one of the hardships of litigation in our judicial system, but such hardship does not measure up to the inconveniences which would result if piecemeal appeals were permitted. Accordingly, this inconvenience has consistently been held insufficient to justify mandamus."

The views expressed by this Court are in accord with those expressed by the United States Court of Appeals for the Eighth Circuit in: *Great Northern Railway Company v. Edward T. Hyde,* 236 F.2d 852:

"We do not regard controversies between litigants, and between their counsel as to where a case can most conveniently, fairly, efficiently and economically be tried as 'really extraordinary.'

"We think that, in the interest of an expeditious, efficient and orderly administration of justice controversies about venue should be finally settled and determined at the District Court level."

VII.

THE TRANSFER ORDER OF THE MINNESOTA FEDERAL COURT IS RES JUDICATA AS TO THE PROPER PLACE OF TRIAL.

(This covers point 7e.)

The same parties appearing in Minnesota Federal Court the same issues were raised and litigants desired an order. The order is final as to the place of trial and should be held to be res judicata. 30 *Am. Jur., Judgments,* Sec. 363.

VIII.

THIS COURT SHOULD DENY MANDAMUS AND PROHIBITION AS BEING IN EFFECT PROCEDURES TO SECURE THE REVIEW OF A NON-APPEALABLE INTERLOCUTORY ORDER.

(This covers point 9.)

It is well settled by a long line of decisions that the Writs of Certiorari, Mandamus and Prohibition may not be used as a substitute for an authorized appeal and, because the statute permits appeal review of interlocutory orders, except as brought out above review by the writs mentioned, is not permissible.

Bankers Life and Casualty Co. v. Holland, 346 U.S. 379, 74 Sup.Ct. 145, 98 L.Ed. 106.

Roche v. Evaporated Milk Assn., 319 U.S. 21, 63 Sup.Ct. 938, 87 L.Ed. 1185.

U. S. Alkali Export Assn. v. U. S., 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554.

IX.

THIS COURT SHOULD DENY MANDAMUS AND PROHIBITION IN THE EXERCISE OF SOUND JUDICIAL DISCRETION.

(This covers point 10.)

This point is adequately covered by the following decisions:

Gulf Research v. Harrison (9 Cir.), 185 F.2d 457, 459, supra.

Great Northern Railway Company v. Hyde (8 Cir.), 238 F.2d 852, supra.

CONCLUSION

These writs should be denied in the interest of speedy and orderly justice. Judge Carter, in the court below, put his finger on the vice of such litigation when he stated: "This case already has been almost venued to death. While it has some judicial breath of life left it should be tried on the merits."

We think that this sums up the whole matter and states the reasons fully why this Court should deny the writs.

Respectfully submitted,

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